

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

THOMAS A. GERACI,)
Plaintiff,) Case No.: 2:19-cv-01038-GMN-VCF
vs.)
DAVID VINSON, *et al.*,)
Defendants.)

)

Pending before the Court is the Motion to Dismiss, (ECF No. 17), filed by Defendants David Vinson (“Vinson”) and DHX Group, Inc. (“DHX”) (collectively “Defendants”). Plaintiff Thomas A. Geraci (“Plaintiff”), (ECF No. 20), and Defendants filed a Reply, (ECF No. 23). For the reasons discussed herein, Defendants’ Motion to Dismiss is granted in part and denied in part.

I. BACKGROUND

This case arises out of Defendant Vinson’s alleged actions during his time on WorldDoc Inc.’s Board of Directors (“Board”) and as Chief Executive Officer (“CEO”). (Compl. ¶ 3, ECF No. 1). Plaintiff alleges WorldDoc Inc. (“WorldDoc”), a medical technology company, was profitable at the time Vinson became CEO in 2011. (*Id.*). Then, between 2014 and 2016, Vinson denied shareholders’ requests to obtain seats on the Board, while giving a company investor a 20 percent ownership stake and a seat on the Board. (*Id.* ¶ 4). Further, Plaintiff alleges that in late 2016, Vinson brought WorldDoc into sale negotiations for approximately \$25 million; however, Vinson instead sold WorldDoc’s source code for \$2.4 million. (Compl. ¶ 6–7). Shortly after the sale of the source code, WorldDoc’s primary Board members resigned, and Vinson appointed friends and colleagues to fill the vacancies. (*Id.* ¶ 8–9). Additionally, Plaintiff alleges that between late 2016 through 2018, Vinson began using and

1 transferring WorldDoc's funds, intellectual property, and resources to other companies, which
 2 Vinson controlled, including DHX. (*Id.* ¶ 10). According to Plaintiff, Vinson began making
 3 large cash withdrawals, large wire transfers to DHX, and paying for DHX's expenses. Further,
 4 WorldDoc started paying Vinson's personal credit card bills, and transferring its remaining
 5 intellectual property to DHX. (*Id.* ¶¶ 11–12). In July 2018, WorldDoc filed for bankruptcy.
 6 (Compl. ¶ 11). In March 2019, Plaintiff purchased the Bankruptcy Estate's claims and rights.
 7 (*See id.*).

8 On June 17, 2019, Plaintiff filed a Complaint, (ECF No. 1), alleging the following
 9 causes of action: (1) breach of fiduciary duty against Vinson, (2) conversion against Vinson; (3)
 10 avoidance and recovery of fraudulent transfers against DHX, actual intent; (4) avoidance and
 11 recovery of fraudulent transfers against DHX, constructive fraud; (5) avoidance and recovery of
 12 fraudulent transfers against Vinson, actual intent; (6) avoidance and recovery of fraudulent
 13 transfers against Vinson, constructive fraud; and (7) recovery and avoided transfers against all
 14 Defendants. Defendants' Motion to Dismiss now follows.

15 **II. LEGAL STANDARD**

16 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
 17 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 18 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
 19 which it rests, and although a court must take all factual allegations as true, legal conclusions
 20 couched as a factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
 21 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
 22 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain
 23 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
 24 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A
 25 claim has facial plausibility when the plaintiff pleads factual content that allows the court to

1 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This
 2 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

3 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
 4 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
 5 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
 6 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
 7 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
 8 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
 9 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
 10 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

11 **III. DISCUSSION**

12 **A. Claim 1 - Breach of Fiduciary Duty against Vinson**

13 “A breach of fiduciary duty claim seeks damages for injuries that result from the tortious
 14 conduct of one who owes a duty to another by virtue of the fiduciary relationship.” *Stalk v.*
 15 *Mushkin*, 199 P.3d 838, 843 (Nev. 2009). A “fiduciary relation exists between two persons
 16 when one of them is under a duty to act for or to give advice for the benefit of another upon
 17 matters within the scope of the relation.” *Id.* Moreover, fiduciary relationships arise where the
 18 parties do not deal on equal terms and there is special trust and confidence placed in the
 19 superior party. *Hoopes v. Hammargren*, 725 P.2d 238, 242 (Nev. 1986). To prevail on a breach
 20 of fiduciary duty claim, the plaintiff must establish: “(1) the existence of a fiduciary duty; (2)
 21 breach of that duty; and (3) the breach proximately caused the damages.” *Klein v. Freedom*
 22 *Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009).

23 Here, Plaintiff’s Complaint alleges that Vinson breached his fiduciary duties to
 24 WorldDoc, its shareholders, and its creditors by selling the source code to Cigna in lieu of
 25 selling WorldDoc to Cigna or another suitor; using the proceeds from the sale of the source

1 code to the detriment of the Debtor and its creditors and shareholders; causing the Debtor to
 2 make the DHX and Vinson transfers, even though there was no legitimate business-related
 3 reason for the same; failing to distribute the proceeds of the source code sale to WorldDoc's
 4 shareholders; and using WorldDoc assets for Vinson's own personal use. (Compl. ¶¶ 51–55).

5 In their Motion, Defendants argue that Plaintiff's breach of duty claim should be
 6 dismissed because in order to "hold a director or officer . . . individually liable, the shareholder
 7 must prove that the director's breach of his or her fiduciary duty of loyalty involved intentional
 8 misconduct, fraud, or a knowing violation of the law." *In re Amerco Derivative Litig.*, 252 P.3d
 9 681, 701 (Nev. 2011) (citing NRS 78.138) (internal quotations omitted).

10 Relevant to Defendants' argument, recently the Nevada Supreme Court adopted the
 11 Tenth Circuit's definition of "intentional" and "knowing," for the purpose of determining
 12 whether a director's or officer's act (or failure to act) constitutes "a breach of his or her
 13 fiduciary duties involving intentional misconduct, fraud or a knowing violation of law." *Chur v.*
 14 *Eighth Judicial Dist. Court in & for Cty. of Clark*, 458 P.3d 336, 342 (Nev. 2020). The court
 15 held that "the claimant must establish *that the director or officer had knowledge that the*
 16 *alleged conduct was wrongful* in order to show a 'knowing violation of law' or 'intentional
 17 misconduct' pursuant to NRS 78.138(7)(b)." *Id.* (internal quotations omitted) (emphasis
 18 added). In light of *Chur*, Plaintiff's allegations are inadequate because they do not rise to the
 19 level of intentional misconduct, fraud, or a knowing violation of the law. Further, Plaintiff's
 20 allegations do not establish that Vinson had knowledge his conduct was wrongful.
 21 Accordingly, Plaintiff's breach of duty claim is dismissed.

22 **B. Claim 2 - Conversion against Vinson**

23 In Nevada, a claim for conversion requires the Plaintiff to show a distinct act of
 24 dominion wrongfully exerted over another's personal property denying, or inconsistent with his
 25 title or rights. *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1048 (Nev. 2000). Conversion

1 is an act of general intent, meaning that no wrongful intent is required, and liability is not
 2 excused by care, good faith, or lack of knowledge. *M.C. Multi-Family Development, LLC v.*
 3 *Crestdale Associates, Ltd.*, 193 P.3d 536, 543 (Nev. 2008). Although money cannot typically
 4 be the subject of a conversion claim, it can be where the money is identifiable, such as being set
 5 aside in a separate account or separately earmarked. *Hester v. Vision Airlines, Inc.*, 2011 WL
 6 856871, at *3 (D. Nev. Mar. 9, 2011) (citing *Lopez v. Javier Corral, D.C.*, 126 Nev. 702
 7 (2010)).

8 Here, Plaintiff alleges that Vinson caused various assets of WorldDoc to be transferred,
 9 used, and dissipated for his own use or the benefit of other companies. Plaintiff further alleges
 10 that the assets, “including cash, IP, and labor, belonged to WorldDoc and WorldDoc had the
 11 right to possession or use of these assets.” (Compl. ¶¶ 58, 59). Plaintiff further claims that as a
 12 result of Vinson’s wrongful acts, Vinson caused WorldDoc’s assets to be converted by others
 13 inconsistent with WorldDoc’s ownership rights. Insofar as Plaintiff asserts Vinson converted
 14 cash, the claim fails as Plaintiff does not allege facts identifying how this cash was earmarked
 15 or whether it was in a separate account. However, because Plaintiff also alleges Vinson’s
 16 conversion of other property, the claim survives Defendants’ Motion to Dismiss.

17 **C. Claims 3, 4, 5, 6, and 7 - Avoidance and Recovery of Fraudulent Transfers**

18 Plaintiff asserts the following claims for relief: (Claim 3) avoidance and recovery of
 19 fraudulent transfers against DHX, actual intent; (Claim 4) avoidance and recovery of fraudulent
 20 transfers against DHX, constructive fraud; (Claim 5) avoidance and recovery of fraudulent
 21 transfers against Vinson, actual intent; (Claim 6) avoidance and recovery of fraudulent transfers
 22 against Vinson, constructive fraud; and (Claim 7) recovery and avoided transfers against both
 23 Defendants. Each one of the above-stated claims is brought under federal and state law.

24 Defendants argue that Nevada law prohibits the assignment of fraud claims, and
 25 therefore, these avoidance and recovery claims should be dismissed. (Mot. at 7). According to

1 Defendants, the policy considerations for prohibiting the assignment of certain claims are that
 2 “[a]ssignability would encourage commercialization of claims,” would “encourage unjustified
 3 lawsuits,” and would “promote champerty.” (Mot. at 7–8) (citing *Curtis v. Kellogg & Andelson*,
 4 73 Cal. App. 4th 492, 505 (1999)); (*In re AgriBioTech, Inc.*, 319 B.R. 207, 210 (D. Nev.
 5 2004)). Defendants submit that the reasoning set forth in the cited caselaw applies equally to
 6 Plaintiff’s fraudulent transfer claims because “Plaintiff has no interest in this lawsuit other than
 7 by virtue of his purchase of the claims from the bankruptcy trustee.” (Mot. at 8). However, as
 8 Defendants note, none of the cases which they cite involve fraudulent transfers. (*Id.*).

9 Ultimately, Defendants fail to provide any legal authority clearly foreclosing the
 10 assignment of avoidance and recovery claims. It is well-established that “under Rule 12(b)(6),
 11 the defendant has the burden of showing that no claim has been stated.” *Kehr Packages, Inc. v.*
 12 *Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991); *see generally* 5B Charles Wright et al.,
 13 Federal Practice & Procedure § 1357 (3d ed. 2004) (“federal courts are in agreement that the
 14 burden is on the moving party to prove that no legally cognizable claim for relief exists”). As
 15 such, Defendants’ Motion is denied as to these claims.

16 **D. Punitive Damages**

17 Defendants move to dismiss Plaintiff’s request for punitive damages. However, punitive
 18 damages are merely a remedy and do not constitute a cause of action. *Wright v. Watkins &*
 19 *Shepard Trucking, Inc.*, No. 2:11-cv-01575, 2014 WL 6388789 at *6 n.3 (D. Nev. Nov. 14,
 20 2014). Accordingly, Defendants’ request is denied.

21 **E. Leave to Amend**

22 Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to “freely give
 23 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit “ha[s]
 24 held that in dismissing for failure to state a claim under Rule 12(b)(6), ‘a district court should
 25 grant leave to amend even if no request to amend the pleading was made, unless it determines

1 that the pleading could not possibly be cured by the allegation of other facts.”” *Lopez v. Smith*,
2 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
3 1995)).

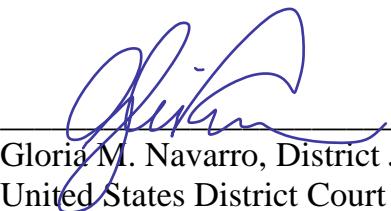
4 The Court finds that Plaintiff may be able to plead additional facts to support his first
5 cause of action. Accordingly, the Court will grant Plaintiff leave to file an amended complaint.
6 Plaintiff shall file his amended complaint within twenty-one (21) days of the date of this Order
7 if he can allege sufficient facts that plausibly establish Plaintiff’s first cause of action. Failure
8 to file an amended complaint by this date shall result in the Court dismissing this claim with
9 prejudice.

10 **IV. CONCLUSION**

11 **IT IS HEREBY ORDERED** that the Defendants’ Motion to Dismiss, (ECF No. 17), is
12 **GRANTED in part and DENIED in part.**

13 **IT IS FURTHER ORDERED** that Plaintiff is **GRANTED** leave to amend consistent
14 with the foregoing. Plaintiff shall have twenty-one (21) days from the date of this Order to file
15 an amended complaint. Failure to file an amended complaint by this date shall result in the
16 Court dismissing Plaintiff’s first cause of action with prejudice.

17 **DATED** this 31 day of May, 2020.

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Gloria M. Navarro, District Judge
United States District Court